IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-716

MAX CLELAND, ADMINISTRATOR OF THE VETERANS ADMINISTRATION, ET AL.,

Appellants,

v.

NATIONAL COLLEGE OF BUSINESS,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

BRIEF OF THE ASSOCIATION OF INDEPENDENT COLLEGES AND SCHOOLS *AMICUS CURIAE*

RICHARD A. FULTON

SACHS, GREENEBAUM & TAYLER
1620 Eye Street, N.W.
Washington, D.C. 20006
(202) 872-9090

Counsel for the Association of Independent Colleges and Schools

Of Counsel:
KENNETH J. INGRAM

Washington, D.C. • THIEL PRESS • (202) 638-4521

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OPINION BELOW

The opinion of the District Court is reported at 433 F.Supp. 605 and is reprinted at Appendix A to the Jurisdictional Statement of the Appellants.

JURISDICTION

Jurisdiction is conferred on this Court by 28 U.S.C. § 1252.

QUESTION PRESENTED

Whether 38 U.S.C. § 1673(d) and § 1789, as amended, which provide, with some exceptions, that the Administrator of the Veterans Administration, in reviewing applications for educational benefits, shall not approve a veteran's enrollment in courses that have been in operation for less than two years or in which more than 85 percent of the enrolled students receive either federal tuition assistance or assistance from the school itself, are consistent with the Due Process Clause of the Fifth Amendment or the First Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law.

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for redress of grievances.

The relevant provisions of 38 U.S.C. (Supp. V) § 1673(d), as amended by Section 205 of Pub. L. 94-502, 90 Stat. 2387 ("85-15" rule) and of 38 U.S.C. (Supp. V) § 1789, as amended by Section 509 of Pub. L. 94-502, 90 Stat. 2401 ("Two Year" rule) are set forth in Appendix D of the Jurisdictional Statement of the Appellants.

CONSENT TO FILE

This Amicus Curiae brief is being filed with the consent of all parties to the proceeding.[1]

INTEREST OF THE AMICUS CURIAE

The Association of Independent Colleges and Schools ("AICS"), a non-profit educational association incorporated under the laws of the District of Columbia, is a membership organization consisting of, *inter alia*, post-secondary non-public educational institutions predominantly organized to offer resident programs including study in the field of business and office occupations. AICS has been in existence for over 50 years and, at present, consists of approximately 500 such institutions, including the National College of Business, located throughout 49 states and the District of Columbia. Many AICS institutions, including the National College of Business, fall within the definition of "institution of higher learning" (38 U.S.C. §§1652(f), 1701(a)(10)), and offer a "program of education" (38 U.S.C. §§ 1652(b), 1701(a)(5)), leading to a "standard college degree" (38 U.S.C. §§1652(5), 1701(1)(11)). Graduates of AICS institutions are employed in the entire spectrum of the American economy, including positions in business and government. The emphasis in education at AICS institutions is training for careers in business, industry and government, including such diverse fields as secretarial, computer programming, accountancy and management of many types.

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[1] Letters of consent on behalf of all parties to the case have been filed with the Clerk of the Court.

AICS is committed in its By-Laws to the establishment and advancement of sound educational and ethical standards in the field of education in and among independent schools and colleges; and to cooperation with other agencies and organizations interested in the field of education on behalf of member institutions, the common standard of which is the independent governance of these non-public institutions without direct reliance upon tax receipts for operations in the post-secondary and collegiate area; and to cooperation with federal, state and local educational institutions and authorities in the maintenance of high standards and sound policies in the educational field. All of the member institutions of AICS are predominantly organized in such a manner that they have a curriculum designed to prepare people for careers in business.

Many of the institutions which are members of AICS enroll students who are eligible to receive educational benefits under Chapters 34, 35 and 36 of Title 38 of the United States Code. In the case of 38 U.S.C. (Supp. V) § 1673(d) as amended by Section 205 of Pub. L. 94-502, 90 Stat. 2387 the institutional members of AICS are precluded from enrolling more than a certain percentage of veteran students and other students who are recipients of federal assistance grants. The decision of the Veterans Administration to refuse to approve, for purposes of VA benefits, the enrollment of certain veteran students in the National College of Business due to 38 U.S.C. (Supp. V) § 1673(d), as amended by Section 205 of Pub. L. 94-502, 90 Stat. 2387 ("85-15" rule) has immediate adverse implications for the veteran students at AICS institutions and for the programs of instruction offered by these institutions. In the case of 38 U.S.C. (Supp. V) § 1789, as amended by Section 509 of Pub. L. 94-502, 90 Stat. 2401 ("Two Year" rule) the institutional

members of AICS are effectively precluded from enrolling veteran students in many courses which have been in operation for less than two years, thereby creating immediate adverse implications for the programs of instruction at AICS institutions as well as for the students, veteran and non-veteran, who attend such institutions.

The Court's decision in this case will have a profound and wide-reaching effect on the programs of instruction offered at AICS institutions throughout the nation. Further the Court's decision will have a significant and long-range impact on the character of students attending AICS institutions.

Consistent with its national perspective, the Amicus Curiae will leave the particular facts of the case to the briefs of the parties and will concentrate its attention on discussing the significant issues present in this case which affect institutions of higher learning, including the members of AICS.

ARGUMENT

AICS contends that the "85-15" rule and the "Two Year" rule violate both the rational basis test of Due Process as well as the higher or medium level of review set forth in such cases as *Trimble v. Gordon*, 430 U.S. 762 (1977). Further AICS contends that the "85-15" rule and the "Two Year" rule violate First Amendment rights to freedom of expression and association.

I.

THE "85-15" RULE AND THE "TWO YEAR" RULE VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

A. The Due Process Clause of the Fifth Amendment.

AICS submits that the "85-15" rule and the "Two Year" rule violate the Due Process Clause of the Fifth Amendment to the United States Constitution. Before discussing the specifics of these rules, it is necessary to consider the constitutional requirements of the Due Process Clause.[2]

Although the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable so as to be violative of due process. *Schlesinger v. Ballard*, 419 U.S. 498, *rehearing denied*, 420 U.S. 966 (1975); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Schneider v. Rusk*, 377 U.S. 163 (1964); *Bolling v. Sharpe*, 347 U.S. 497 (1954). If a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment. *Johnson v. Robison*, 415 U.S. 361, 364, n. 4 (1974); *Richardson v. Belcher*, 414 U.S. 78, 81 (1971).

There are a number of tests applicable to a determination of whether a statute comports with the requirements

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[2] Veterans have a sufficient interest in the receipt of veterans' benefits to be protected by the Due Process Clause from arbitrary government action withdrawing or modifying VA benefits. *DeRodulfa v. United States*, 461 F.2d 1240 (D.C. Cir.) *cert. denied*, 409 U.S. 949 (1972); *Plato v. Roudebush*, 397 F.Supp. 1295 (D. Md. 1975); *Fielder v. Cleland*, 433 F.Supp. 115 (E.D. Mich. 1977).

of equal protection and due process. The traditional rational basis analysis is set forth in *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920):

> . . . the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); *Schlesinger v. Ballard, supra; Vlandis v. Kline*, 412 U.S. 411 (1973); *Flemming v. Nestor*, 363 U.S. 603, 611 (1960).

A stricter medium level of review has recently been set forth in *Trimble v. Gordon*, 430 U.S. 762, 766-67 (1977):

> [this] Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose . . . . In this context, the standard just stated is a minimum; the Court sometimes requires more. Though the latitude given state economic and social regulation is necessarily broad, when the state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny.

The so-called strict scrutiny analysis requires much more than a showing of a rational basis to pass constitutional muster. Rather, legislation can be sustained only where it is shown to be necessary to promote a compelling governmental interest. To trigger the application of the strict scrutiny test, the legislation at issue must effect a suspect classification or act upon a fundamental right. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Robison v. Johnson*, 312 F.Supp. 848 (D. Mass. 1973). When the strict scrutiny test applies, legislation

rarely passes constitutional muster. *Robison v. Johnson*, *supra* at 854.

The medium level of review has not been confined only to cases of gender and legitimacy classifications. In *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), this Court invalidated a statute denying food stamp benefits to households containing one or more persons unrelated to the members of the household by invoking a medium level of review. This Court stated that even if households containing unrelated persons posed a greater threat of abuses, Congress was required to employ more delicate tools to detect potential abuses. *See* 413 U.S. at 536-37. *See also, Jiminez v. Weinberger*, 417 U.S. 628, 636-37 (1974); *United States Department of Agriculture v. Murray*, 413 U.S. 508 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

AICS submits that the medium level of review is clearly justified in this case. As the District Court noted in its opinion:

> . . . VA educational benefits can make the difference between a higher education that imparts marketable skills and no training for any sort of permanent occupation. In today's specialized society, higher education or training . . . is certainly essential to employment which will adequately support an individual and his or her family. 433 F.Supp. at 619.

Although education itself has not been found to be a fundamental constitutional right, it has been found to be both vital and important to our society. *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973); *Wisconsin v. Yoder*, 405 U.S. 205, 213, 237-39 (1972); *Abington School Dist. v. Schenpp*, 374 U.S. 203, 230 (1963): *Brown v. Board of Education*, 347 U.S. 483 (1954); *McCollom v. Board of Education*, 333 U.S. 203,

212 *et seq.* (1948); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

For the reasons set forth *infra*, AICS submits that neither the "85-15" rule nor the "Two Year" rule can survive scrutiny under the medium level of review. In order to determine whether the "85-15" rule or the "Two Year" rule meet the rational basis test, it is necessary to find the purpose of the statute, examine the nature of the classification effected, and to consider the rational nexus, if any, between the two. If there is no rational nexus, then the statute of necessity must fall on the ground of unconstitutionality.

B. Statutory Purpose of the "85-15" Rule and the "Two Year" Rule.

Chapter 34 of Title 38, United States Code, concerning veterans' educational assistance, contains its own statement of purpose. 38 U.S.C. § 1651 provides as follows:

> The Congress of the United States hereby declares that the education program created by this chapter is for the purpose of (1) enhancing and making more attractive service in the Armed Forces of the United States, (2) extending the benefits of a higher education to qualified and deserving young persons who might not otherwise be able to afford such an education, (3) providing vocational readjustment and restoring lost educational opportunities to those service men and women whose careers have been interrupted or impeded by reason of active duty after January 31, 1955, and (4) aiding such persons in attaining the vocational and educational status which they might normally have aspired to and obtained had they not served their country.

This Court, in construing 38 U.S.C. § 1651, has held that the aim of this statute is to assist those who served on active duty in the Armed Forces to readjust to civilian

life. *Johnson v. Robison, supra* at 377. It is noteworthy that neither 38 U.S.C. § 1651 nor *Johnson v. Robison, supra,* suggests that the aforementioned statement of Congressional purpose was in any way related to other educational assistance programs administered by the federal government. Rather, the whole thrust of the statutory purpose is directed toward aiding veterans by expanding their range of educational opportunities after leaving the service, in order to ease the readjustment to civilian life.

C. Legislative History and Analysis of the "85-15" Rule.

The legislative history of 38 U.S.C. (Supp. V) § 1673(d) as amended by Section 205 of Pub. L. 94-502, 90 Stat. 2387 commences with the first version of the 85-15 rule, which was enacted on July 16, 1952. 38 U.S.C. § 931 (1952) provided as follows:

> The Administrator shall not approve the enrollment of any eligible veteran, not already enrolled, in any nonaccredited course below the college level offered by a proprietary profit or proprietary nonprofit educational institution for any period during which the Administrator finds that more than eighty-five percentum of the students enrolled in the course are having all or any part of their tuition fees or their charges paid to and for them by the educational institution or the Veterans' Administration . . . .

The impetus for this provision developed as a result of the work of a House of Representatives Select Committee, chaired by Representative Teague, to investigate the educational program under the GI Bill. See H.R. Rep. No. 1375, 82nd Cong., 2d Sess. (1952). This Committee concluded that, concerning proprietary profit schools below the college level, there had been a rapid uncontrolled expansion of private profit schools during the first several years of veterans training programs, and that many of these schools were without educational background, expensive, and offered training of doubtful quality. The Committee also noted that exploitation by private schools had been widespread, including falsification of cost data, falsification of attendance records, overcharges for supplies, improper billings, and unethical influence of VA and state officials. The Committee noted that criminal practices had been widespread in this class of school. (H.R. Rep. No. 1375, 82nd Cong., 2d Sess. 3-4 (1952)).

By contrast, the Committee had no significant findings of abuses in connection with the college level educational assistance program:

> The veterans training program at the college level, although experiencing some administrative difficulties, has been carried out successfully. Participating colleges and universities have rendered outstanding service in training veterans under many adverse conditions.

H.R. Rep. No. 1375, 82nd Cong., 2d Sess. 4 (1952). The Committee returned to this subject in a later phase of its report:

> The veterans' training program at the college level has enjoyed more harmony and success than any other phase of the program. Those veterans attending established, accredited colleges and universities who pursued their courses with sincerity received the best training available in this country . . . . Considered as a whole, there is little question that better training was received at the college level for less money than in any other phase of the veterans' training program. H.R. Rep. No. 1375, 82nd Cong., 2d Sess., 221 (1952).

H.R. Rep. No. 1943, 82nd Cong., 2d Sess. (1952), which accompanied H.R. 7656,[3] noted that the 85-15 requirement[4]

> . . . is believed to be a real safeguard to assure sound training for the veteran, at reasonable cost, by seasoned institutions. Had such a requirement been in effect during the life of the so-called "GI bill of rights," there is little doubt that considerable savings would have resulted and that much better training would have been realized in many areas.

The VA supported the 85-15 requirement on the following grounds:

> One of the most instructive safeguards against unsound training in institutions interested only in exploiting the program for commercial gain is the provision that the Administrator shall not approve the enrollment of any eligible veteran, not already enrolled, in any nonaccredited courses below the college level offered by a proprietary profit or proprietary nonprofit educational institution for any period in which the Administrator finds more than three-fourths of the students enrolled in the course are having all or any part of their tuition, fees, or other charges paid to or for them by the institution or by the Veterans' Administration. Stated another way, this means that institutional courses of the specified character in proprietary institutions could not qualify for new enrollments under this proposal unless at least one-fourth of

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[3]When passed in final form, this legislation became Pub. L. 550, 66 Stat. 667 (July 16, 1952). The 85-15 requirement was codified at 38 U.S.C. § 931 (1952). The requirement is found in § 226 of Pub. L. 550.

[4]In the 1952 bill as drafted, however, it was a 75-25 requirement.

> those enrolled in the course are meeting the tuition and other institutional charges out of their own pockets or through assistance provided from sources other than the Veterans' Administration or the institution. The term 'nonaccredited courses' is not specifically defined in this section of the bill, but apparently contemplates, in general, the class of courses, approvable in accordance with the detailed standards provided by Section 254 of the bill, except that it would not apply to other than proprietary institutions. H.R. Rep. No. 1943, 82nd Cong., 2d Sess. 197 (1952).

Hence, it seems clear that at the time the original 85-15 requirement was promulgated, Congress was concerned with abuses in veterans' educational assistance in proprietary profit schools below the college level. In the area of college level education, the Teague Committee in its report (H.R. Rep. No. 1375, 82nd Cong., 2d Sess. (1952)) specifically found that college level aid was being used successfully and without notable abuse. The Congress' expressed concern was to provide sound training for veterans.

In 1958, 38 U.S.C. § 931 was recodified at 38 U.S.C. § 1623(c) with minor modifications. Pub. L. 85-857, 72 Stat. 1178 (September 1, 1958). The direct predecessor of the present law was enacted in 1966 as part of the Veterans' Readjustment Benefits Act of 1966. Pub. L. 89-358, 80 Stat. 12. H.R. Rep. No. 1258, 89th Cong., 2d Sess. (1966) (to accompany H.R. 12410) indicated that the 85-15 rule was carried forward from a similar provision applicable to the Korean GI education and training program. H.R. Rep. No. 1258, 89th Cong., 2d Sess. (1966). S. Rep. No. 269, 89th Cong., 2d Sess. 31, 48 (1966) (to accompany S. 9) contains similar references to the Korean GI program. The Senate report also

characterized the 85-15 rule as a protection against unsound training. S. Rep. No. 269, 89th Cong., 2d Sess. 31 (1966). The Senate report also noted that the 85-15 rule was designed to afford assurance that nonaccredited courses below the college level must prove themselves by attracting nonveteran students who were willing to pay their own money for the instruction furnished. Hence, in 1966, the Congress again was exclusively concerned about the soundness of training for veterans. Other federal educational assistance programs, which now amount to approximately $3.3 billion, were just beginning at that time: no reference was made to these other programs in the 1966 law. Also, most significantly, it was still assumed in 1966 that potential abuses were of concern in nonaccredited courses below the college level. Pub. L. 89-358, 80 Stat. 12 (1966).

Three major changes occurred in the scope, character and computation of the 85-15 rule in 1976 in the Veterans' Educational Employment Assistance Act of 1976, Pub. L. 94-502, 90 Stat. 2387. [5] By one change in the law the 85-15 requirement was made applicable to courses leading to a standard college degree. The second change in the rule was in the computational formula: within the 85 percentum figure were to be included, for the first time, along with veteran entitlements, recipients of other federal educational grants which are discretionary in nature. Thirdly, a new provision was included

[5] Between 1966 and 1976 there had been a number of minor changes in 38 U.S.C. § 1673(d). None of these changes, however, altered the basic structure of the rule as set forth in 1966. *See* Pub. L. 90-77, 81 Stat. 185 (1967); Pub. L. 91-219, 84 Stat. 78 (1970); Pub. L. 92-540, 86 Stat. 1090 (1972); Pub. L. 93-508, 88 Stat. 1582 (1974). None of these changes made any reference to non-VA federal educational assistance programs nor did they make the rule applicable to courses leading to a college degree.

allowing the VA Administrator discretion to waive the requirements of the 85-15 rule " . . . in whole or in part, if the Administrator determines it to be in the interest of eligible veterans and the Federal Government."

The legislative history does not explain the reasons for these changes, nor does it explain in what manner the new rule was to effectuate the purposes of the legislation. S. Rep. No. 94-1243, 94th Cong., 2d Sess. (1976) which accompanied S. 969, sets out the major legislative history of the new 85-15 rule. As to program abuse, the Senate report noted that the Senate Veterans Affairs Committee had examined, *inter alia*, a General Accounting Office report, "Educational Assistance Overpayments, a Billion Dollar Problem—A Look at the Causes, Solutions, and Collection Efforts." [6] (March 19, 1976). Nowhere in the GAO study is there any reference to the 85-15 rule as an appropriate means to remedy the overpayment of benefits problem. Rather, the GAO recommended a series of steps designed to strengthen the administration of the benefit programs by the VA. There is also no suggestion in the GAO report that VA overpayments and abuses of VA benefits have any connection with other federal educational assistance programs.

The most explicit statement of purpose behind the expanded 85-15 rule contained in Pub. L. 94-502 is contained in S. Rep. No. 94-1243, 94th Cong., 2d Sess. 50 (1976):

[6] This report is reprinted in *Hearings on Overpayments and Enforcement of Standards in the Veterans' Education Program*, 94th Cong., 2d Sess. 1735-1799 (1976). The Senate Report also referenced an investigative series on postsecondary education appearing in the Chicago Tribune. This series did not deal with institutions of higher learning, such as the National College of Business, or programs of education leading to a standard college degree. Rather this series dealt with student consumer abuse in trade and barber schools.

Other amendments in the reported bill which are intended to reduce the possibility or extent of abuse include first, extension and expansion of the 85-15 rule to all institutions enrolling veterans; and second, the deletion of existing statutory exceptions to the statutory requirement of 2 years of operation prior to VA approval of enrollment of veterans. Under the reported bill, the 2 year rule would apply to certain branches or extensions of institutions. In both of these situations, the reported provisions are intended to allow the free market mechanism to prove the worth of the course offered, by requiring that it respond to the general dictates of an open market as well as to those with available Federal moneys to spend. In the first instance at least 15 percent of the enrolled students must not be in receipt of VA payments or other Federal grants.

See also S. Rep. No. 94-1243, 94th Cong., 2d Sess. 88-89 (1976). The Committee report thus states that the expanded 85-15 rule is designed to reduce potential as well as actual abuse as well as to provide an opportunity for the free market mechanism to prove the worth of the particular course offered.

The Senate Committee report does address itself briefly to one of the significant changes in the 85-15 requirement, by which the rule is imposed on all courses attended by veterans including those courses leading to a standard college degree. The report notes that the rationale for the .pplication of the 85-15 rule should be "logically" extended to courses other than just those not leading to a standard college degree. The report expresses concern about limiting those situations in which substantial abuse could occur. S. Rep. No. 94-1243, 94th Cong., 2d Sess. 88-89 (1976). The aforementioned GAO report, however, made no findings or recommendations that the

85-15 rule would be either necessary or helpful in preventing abuse and/or overpayment of veterans benefits. There is no explanation in the report of why the 85-15 rule should be "logically" extended to courses leading to a standard college degree.

The Senate report also fails to explain why the nature of the formula for the 85-15 computation is significantly altered by Pub. L. 94-502 by the inclusion of recipients of other federal educational grants as part of the 85 percent figure. The Senate report notes as follows on this matter:

> In addition, in computing the 85-15 requirement, the amendment would require the inclusion of not only those students subsidized by the Veterans' Administration, but also those students in receipt of grants from other federal agencies. The Committee believes the inclusion of other students receiving federal grants is consistent with the general intent and rationale of section 1673(d) as previously discussed. This would include Federal grants such as basic educational opportunity grants (BEOG) and supplemental educational opportunity grants (SEOG) made by the Department of Health, Education and Welfare . . . .

S. Rep. No. 94-1243, 94th Cong., 2d Sess. 89 (1976). There is, however, nothing about the inclusion of BEOG and SEOG recipients within the inclusion of the 85 percent figure which is consistent with the rationale or the history of 38 U.S.C. § 1673(d), which had previously only concerned veterans. None of the legislative history of this provision demonstrates any connexity between veterans educational entitlement grants and other federal educational discretionary grants from the standpoint of so-called abuses in the veterans educational programs.

Although the Senate Report suggests that one of the reasons for expanding the coverage of the 85-15 rule was to avoid potential abuses concerning educational benefits for veterans, the report noted that the VA was unable to estimate the cost impact of the extension of the 85-15 rule. S. Rep. No. 94-1243, 94th Cong., 2d Sess. 90, 176 (1976).

The legislative history concerning Pub. L. 94-502 suggests two interrelated purposes behind the expanded 85-15 rule. The major purpose was to prevent abuses of programs dealing with veterans educational assistance. The supposed means by which this would be accomplished was as a result of the so-called market value test: if a course could attract 15% or more nonfederal aid recipients, the course would presumably be proven sound and appropriate for veterans to attend and receive VA assistance.[7] AICS submits that the purposes set forth in 38 U.S.C. § 1651 (1970) and the purposes derived from the legislative history behind 38 U.S.C. (Supp. V) § 1673(d) as amended by Section 205 of Pub. L. 94-502, 90 Stat. 2387 do not on analysis justify the distinctions

[7] As noted previously in this brief, there is very little, if any, support in the legislative record to conclude that there has been a significant abuse (as distinguished from the internal administrative problems of the VA resulting in overpayments of benefits) of VA educational assistance programs at the college level. The original 85-15 rule did not apply to college level courses because of a specific legislative finding that VA programs at the college level worked well with minimal problems. H.R. Rep. No. 1375, 82nd Cong., 2d Sess. 4, 221 (1952). The GAO report, "Educational Assistance Overpayments, a Billion Dollar Problem—A Look at the Causes, Solutions, and Collection Efforts" (March 19, 1976), nowhere recommends that the 85-15 rule is needed to deal with the overpayments problem. Nor does that report point to the absence of the 85-15 rule for the courses leading to a standard college degree as a cause of the overpayments problem.

made in the statute and that the statute thus violates the Due Process Clause of the Fifth Amendment.

The 85-15 rule requires that the VA Administrator shall not approve the enrollment of any veteran, not already enrolled, in any course for any period during which more than 85 percent of the students in the course are having their tuition, fees or other charges paid to or for them by the educational institutions, the VA or any other federal agency. The rule also provides that the VA Administrator may waive the requirements of the rule if the Administrator determines it to be in the interest of the eligible veteran and the Federal Government.

A number of classifications are made in this statute, two of which are crucial from the standpoint of constitutional review. First, the statute establishes two categories of veterans, new and old enrollees. Those veterans who enrolled in a course before the course had more than 85 percent enrollment by veterans and other recipients of federal grants and recipients of institutional aid ("old enrollees") do not lose their benefits. The new veteran enrollees however are not allowed to enroll in a course with more than 85 percent (from the VA, other federal agencies and the institution) recipients and obtain VA benefits. Also, the statute distinguishes between veterans and other recipients of federal grants. It is only the veterans who will lose the opportunity to obtain benefits should the enrollment in a course exceed 85 percent veterans, other federal grant recipients and institutional grant recipients. Hence, the veteran stands in a less favored position than other recipients of other federal educational assistance from the standpoint of the courses he may take and continue to receive financial assistance. There is also a distinction between the recipients of educational assistance (veterans, other fed-

eral grant recipients, institutional aid recipients) and the paying students, which underlies the 85-15 formula. If the paying students fall below 15 percent in any course, then new veteran enrollees cannot enroll in the course and obtain VA benefits.[8]

AICS submits that there is no rational nexus between the statutory classification between veterans and other recipients of federal aid and the statutory purposes as is explicitly set forth in 38 U.S.C. § 1651, which is set forth *supra*. Certainly there can be no reason to distinguish between new and old veteran course enrollees in order to assist veterans in readjusting to civilian life. That goal is effectuated by treating all veterans as a single class. Nor is there any reason to put veterans in a less favored position than other recipients of federal educational grants. Rather 38 U.S.C. § 1651 would appear to mandate that veterans be treated at least as well as other federal educational grantees.

AICS also submits that there is no rational nexus between the purposes of the statute derived from the legislative history and the aforementioned classifications established in 38 U.S.C. (Supp. V) § 1673(d) as amended by Section 205 of Pub. L. 94-502, 90 Stat. 2387.[9]

[8] Of course, the concept of the paying student is somewhat of a misnomer since many of these students are also receiving financial aid in the form of loans. The federal government now guarantees approximately $6 billion of student loans. It is also interesting to note that the percentage of paying students *and* the percentage of non-VA federal educational grantees are matters over which the veteran has no control.

[9] Although the legislative history of a statute is undoubtedly a pertinent subject for review in order to determine the purpose of a statute when a constitutional issue is raised, it seems clear that where there is a legislatively enacted statement of Congressional purpose, as here, that provision should be given more significance in connection with statutory purpose than committee reports and other indicia of legislative history.

There seems no reason to distinguish between new and old veteran course enrollees as a means to cure abuses of VA benefits. The timing of enrollment is, logically, a fortuitous event without any relation to whether or not VA benefits will be abused. Certainly, there is nothing in the legislative history to suggest otherwise.

Nor is there any reason to distinguish between veterans and other recipients of federal educational grants in order to avoid potential abuses in the award of VA benefits. There is nothing in the legislative history to suggest any relation between other federal educational grant programs, discretionary in nature, and potential abuses in educational assistance for veterans. Nor does logic dictate or even suggest that there would be such a connection.

The "free market" theory also does not support any of the statutory distinctions. The free market theory suggests that unless 15 percent of the students in the course are willing to provide their own money to attend a course, there is a significant risk that the course is not sound or that VA benefits would be otherwise exploited or abused. The free market theory as a justification for the 85-15 rule developed prior to the expansion of the rule to college level courses. *See* S. Rep. No. 269, 89th Cong., 2d Sess. 31 (1966). There is no analysis in the 1976 legislative history concerning the viability of this concept to colleges where frequently large portions of the student body are receiving financial aid from a variety of sources.[10] In any event, the free market theory does not logically justify treating veterans less well than other

[10] Many students are the recipients of guaranteed student loans, as noted in footnote 8, *supra*. However, these students are considered to be within the 15 percent category of "paying" students for purposes of the 85-15 rule.

recipients of federal educational assistance in order to avoid potential abuses in VA educational programs.

As the classifications set forth in the "85-15" rule do not bear a rational relationship to the purposes behind the statute, AICS submits that the statute is constitutionally invalid under the Due Process Clause of the Fifth Amendment. *See Hampton v. Mow Sun Wong, supra; Schlesinger v. Ballard, supra; Vlandis v. Kline, supra; Flemming v. Nestor, supra; Royster Guano Co. v. Virginia, supra.*

AICS also submits that 38 U.S.C. (Supp. V) § 1673(d), as amended by Section 205 of Pub. L. 94-502, 90 Stat. 2387 violates the Due Process Clause for another reason. There is no rational basis for including within the 85 percent computation recipients of veterans' educational aid and recipients of other federal educational grant programs, which are of a different character and purpose than veterans' educational grants. One test of rational basis would be whether the inclusion of non-veteran educational grants bears any connection to the problem of abuse of VA educational benefits. There is nothing in logic or legislative history or the very nature of the two types of grants to support the conclusion that there is such a connection.

AICS also believes that the statute as presently applied does not provide procedural due process to veteran students. Under 38 U.S.C. (Supp. V) § 1673(d), as amended by Section 205 of Pub. L. 94-502, 90 Stat. 2387, the Administrator is given authority to waive the requirements of the statute if he determines it to be in the interest of the eligible veteran. AICS thus submits that the VA's administration of 38 U.S.C. § 1673(d) and in particular its failure to provide any administrative

procedure for an individual veteran to request a waiver does not comport with procedural due process. *See Matthews v. Eldridge,* 424 U.S. 319, 332 (1976); *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972).

Computations pursuant to the 85-15 rule apparently are not determined until *after* course enrollments and/or admissions have been completed—hence precluding a veteran from receiving any notice in advance as to whether he will receive VA benefits in connection with attendance in a particular course. For instance, when a veteran is admitted to college in early Spring, he doesn't know whether there will be a waiver of any of the requirements of the statute, which is determined in July, and he doesn't know the total number of veteran and non-veteran federal educational grantees in the course. The inevitable result is to cause veterans to stay away from enrollment at schools where there may be a significant chance that they will be unable to obtain VA benefits in connection with their education. At the same time the "85-15" rule in no way affects the eligibility of students for BEOG and SEOG grants. These procedures thus further reflect the denial of due process inflicted by the 85-15 rule. They also reflect an interference with the First Amendment freedom of association, described *infra.*

D. Legislative History and Analysis of the "Two Year" Rule.

The forerunner of the "Two Year" rule was first enacted in 1949. Pub. L. 81-266, 23 Stat. 653. That statute prohibited payments to institutions that had been in operation for less than one year. Public and other tax-supported schools were exempted from this rule by Pub. L. 81-610, 64 Stat. 337. The original version of the rule also exempted degree-granting institutions. Section

227 of the Korean Conflict GI Bill, Pub. L. 82-550, 66 Stat. 667, extended the requirement to two years. For the first time in the history of the two-year rule, Pub. L. 94-502 included a provision, 38 U.S.C. § 1789(c), excluding from the exemptions to the rule courses offered at a branch or extension of a proprietary profit or non-profit educational institution if the branch was located outside the normal commuting distance of the parent institution. Subsection (c) of 38 U.S.C. § 1789 is a limitation on the exceptions contained in subsection (b) to the prohibition contained in subsection (a) of 38 U.S.C. § 1789.

The "Two Year" rule, like the "85-15" rule effects a discrimination between veterans and all other persons receiving Federal educational assistance. The "Two Year" rule applies only to veterans, permitting non-veterans to use Federal educational grants to attend institutions which do not comply with this rule. It is noteworthy that almost 50% of Federal educational benefits are now paid to non-veterans and that Federal educational benefit programs now aid more non-veterans than veterans. S. Rep. No. 94-1243, 94th Cong., 2d Sess. 89 (1976). This discrimination against veterans has no basis in the purpose of the rule as set forth in 38 U.S.C. § 1651. Nor can it be said that the "Two Year" rule has the effect of assuring educational quality since it is only veterans benefits, as opposed to all other Federal educational benefits, which are the subject of this rule. Hence AICS submits that the "Two Year" rule is also without rational basis and must be held to conflict with the Due Process Clause of the Fifth Amendment.

38 U.S.C. (Supp. V) § 1789(c), as amended by Section 509 of Pub. L. 94-502, 90 Stat. 2401, effects a distinction between private and public institutions of

higher learning. Under the amended law, a private institution of higher learning is precluded from having branches at locations beyond the normal commuting distance of the institution. A similarly situated public institution, however, may maintain a branch throughout the entire area of its taxing jurisdiction. This distinction between public and private institutions bears no relation to the purpose of veterans educational assistance as set forth in 38 U.S.C. § 1651 nor does this distinction make any logical sense. This discrimination has a particularly harsh impact on private institutions like the National College of Business, which is located in an area of the country which is sparsely populated. For this additional reason, AICS submits that the "Two Year" rule cannot survive constitutional review.

II.

THE "85-15" AND THE "TWO YEAR" RULES VIOLATE FIRST AMENDMENT RIGHTS TO FREEDOM OF EXPRESSION AND ASSOCIATION.[11]

As noted previously, the "85-15" rule and the "Two Year" rule act generally to preclude veteran students from receiving veteran educational benefits if they enroll in courses where more than 85 percent of the then existing enrollment consists of veterans, other federal grant recipients and institutional aid recipients or if they enroll in courses which have been in existence for less than two years. Hence, the veteran student is actively discouraged by these statutory rules from attending certain courses which may represent his own free choice of activity. AICS submits that these statutory rules

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[11] Although the District Court did not specifically reach this issue, this Court may affirm the judgment below on these grounds as well as upon the grounds relied upon by the District Court. *See, e.g., California Bankers Ass'n v. Schultz*, 416 U.S. 21, 71 (1974).

therefore limit a veteran student's right to freely associate with other students and educators in the educational context of his choice and also thereby limit such a student's right to express himself.

Students and teachers do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969). The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

Although education itself has not been found to be a fundamental constitutional right, it has been found to be both vital and important to our society. *San Antonio School District v. Rodriguez, supra; Wisconsin v. Yoder, supra; Abington School Dist. v. Schenpp, supra; Brown v. Board of Education, supra; McCollom v. Board of Education, supra; Pierce v. Society of Sisters, supra; Meyer v. Nebraska, supra.*

Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the right of association is not explicitly set out in the First Amendment, it has long been held implicit in the freedom of speech, assembly and petition. *Healy v. James*, 408 U.S. 169 (1972); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *NAACP v. Button*, 371 U.S. 415 (1963); *NAACP v. Alabama*, 357 U.S. 440 (1968). The right of association extends, *inter alia*, to the freedom to associate for the advancement of political or governmental beliefs and ideas, *Bates v. Little Rock*, 361 U.S. 516 (1960);[12] *Sweezy v. New Hampshire, supra*; the freedom to associate for the assertion of material economic or legal interests, *Brotherhood of RR Trainmen v. Virginia*, 377 U.S. 1, *rehearing denied*, 377 U.S. 960 (1964); *NAACP v. Button*, 371 U.S. 415 (1953); *see Griswold v. Connecticut*, 381 U.S. 479 (1965); and the freedom to associate for social purposes, *Evans v. Newton*, 382 U.S. 296 (1966); *Griswold v. Connecticut, supra.* The right to freedom of association is not absolute, but a substantial state interest must be shown in order to justify interference with freedom of association. *NAACP v. Alabama, supra.*

AICS contends that the "85-15" rule and the "Two Year" rule exert a chilling effect on a veteran's right to freedom of association. Although these statutory rules do not by their specific terms preclude veterans from enrolling in certain courses, they actively discourage veterans from doing so by depriving them of educational assistance benefits which they would otherwise receive. The effect of these rules in discouraging attendance in certain courses is thus quite direct. Nor is the effect of these rules only on veteran students. Educational institutions, mindful of veteran enrollment patterns, will consider course structures with an eye to the impact of these statutory rules, thus intruding the government into the educational process.

If a person has the right to associate for social purposes, for economic or legal purposes and for political purposes, it follows that a person has the right to associate with others for educational purposes, especially

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[12] In *Bates*, the Supreme Court noted that the freedom of association was protected not only from heavy-handed frontal attack but from more subtle government interference as well. *Bates v. Little Rock, supra* at 523.

in view of the oft-stated importance of education to our society. Education is also by its very nature inextricably intertwined with expression, speech, and the exchange of ideas, which are at the core of First Amendment values. To interfere with one's ability to participate in the educational process is to interfere with one's right to express himself in a context of his choosing.

AICS also submits that there is no substantial or compelling interest to justify the interference with First Amendment values, which is caused by the "85-15" rule and the "Two Year" rule. A compelling interest analysis appears to be similar to a strict scrutiny analysis for purposes of Due Process review. As noted *supra*, statutes subject to this review rarely pass constitutional muster and AICS submits that neither the "85-15" rule nor the "Two Year" rule can survive a strict scrutiny review. Thus, AICS submits that there is no compelling interest to support either the "85-15" rule or the "Two Year" rule and that these rules therefore are in violation of the First Amendment.[13]

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[13] One must also wonder what compelling interest can support a statute when the statute by its own terms gives the VA Administrator discretion to waive the requirements of the statute entirely.

CONCLUSION

For the aforementioned reasons, the judgment of the United States District Court for the District of South Dakota should be affirmed or, in the alternative, the appeal should be dismissed.

Respectfully submitted,

RICHARD A. FULTON

SACHS, GREENEBAUM & TAYLER
1620 Eye Street, N.W.
Washington, D.C. 20006
(202) 872-9090

Counsel for the Association of Independent Colleges and Schools

Of Counsel:

KENNETH J. INGRAM